In the Supreme Court of the United States

OCTOBER TERM, 1969

JERRY ALLEN PENNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a non-jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted for failing to submit for induction into the Armed Forces, in violation of 50 U.S.C. App. 462. On November 8, 1968, he was sentenced to imprisonment for five years, subject to parole as determined by the Board of Parole. The court of appeals affirmed (420 F. 2d 344; Pet. App. 1–7).

Petitioner's Selective Service file [1] shows that when he registered with Local Board 4, Beaver County,

---

[1] The Selective Service file is contained in the record filed with the Clerk of this Court. Citations of record are to the trial transcript ("Tr."), designated as Volume IV of the record.

389-152—70

Oklahoma, he claimed, as a member of the Mennonite Brethren Church, to be a conscientious objector to war in any form. While a student at a college operated by the Mennonites—Tabor College in Hillsboro, Kansas—he executed an SSS Form 150 claiming C.O. status, and returned it to his draft board. He was classified I–A–O—*i.e.*, available for non-combatant service. He did not object at that time to this classification, but obtained a student deferment. On October 14, 1965, after his student deferment had expired, petitioner was again classified I–A–O. He requested and received a personal appearance, at which time he stated that he had nothing further to submit beyond the statements in his previously filed form. He maintained that he was entitled to a I–O classification, but the board retained petitioner in I–A–O.[2]

Petitioner appealed to the state appeal board, and following the procedure then in effect, his case was submitted to the Department of Justice for investigation and recommendation. An FBI investigation was made, and a résumé thereof was sent to petitioner. The résumé contained responses from approximately 30 sources, including officials of schools attended by petitioner, classmates, relatives, friends, neighbors, and co-religionists. Some of the persons interviewed said that petitioner had not been a strict observer of his faith, that he smoked, drank alcoholic

[2] Petitioner's offer of proof through the clerk of the board (Tr. 16–18; see Pet. 12–14) was to the effect that a majority of Mennonites were classified I–A–O. The clerk also indicated that the local board thought that more facilities to make the determination were available to the appeal board.

beverages, did not attend church regularly, and, as described by a college classmate, had been "carousing around" with girls. Also contained in the report were statements by classmates that Tabor College encouraged students to fill out conscientious objector forms, but that this was generally regarded as a "big joke"; that when petitioner executed his form, he so treated it and expressly told a roommate that he was not sincere in so doing (Tr. 90). A neighbor suggested that petitioner had made the C.O. claim at the direction of his father—who had done the same thing during World War II—and his uncle. There were strong differences of opinion on the question whether petitioner was sincere in his claim of conscientious objection; relatives and co-religionists believed that he was, but college classmates disagreed.

After a personal interview with petitioner, the Department of Justice hearing officer submitted his written opinion, stating that, in their discussion, petitioner had acknowledged the correctness of the reports of his personal habits, and that he appeared to have no broad conception of the teachings and practices of his church. Petitioner admitted that his C.O. form had been filled out by the dean of men at Tabor College. The officer felt that petitioner's remorse concerning his past personal conduct was founded more upon the fact that his parents had learned of his behavior than a real attempt to be devout. The officer was not convinced that petitioner was sincere in his claim to conscientious objection but concluded, in view of the entire background, that he should be classified I–A–O (Pet. App. 8–12).

On January 7, 1967, the state appeal board classified petitioner I–A–O by a unanimous vote. Because of the unanimity, petitioner had no authority to file an appeal. However, on March 15, 1967, the National Director of Selective Service filed an appeal with the President. On June 21, 1967, the national appeal board classified petitioner as I–A. One month later, he received a notice of induction. On August 2, 1967, petitioner reported to the induction station, but refused to submit.

In the ensuing criminal prosecution, the district court found petitioner guilty (Tr. 150–160). The court reviewed the entire factual setting, from petitioner's initial registration to his refusal to report for induction. It found that there was a basis in fact for the last classification, particularly in light of the materials contained in the FBI résumé which petitioner had an opportunity to challenge but, for the most part, did not. The court felt that petitioner's religious training and belief could not have been so devout and absolute as to military service and yet so disregarded in his personal conduct. The court also took note of the fact that, when asked to cite instances when he publicly declared his views toward military service, petitioner had listed only one occasion in 1957, and then recent group discussions with friends. The court observed that petitioner was but twelve years old in 1957, and that his claim of discussions with friends had not been borne out (Tr. 154). The court concluded that the burden was upon the registrant to bring himself within the exempted class; that whether or not the board had made an erroneous classification,

any error would be cured by the *de novo* review of the final classification board since all the pertinent information was before it; and that the contradictions in the record provided a basis in fact for determining that petitioner's I–O claim was not sincere. The court of appeals also found that any error by the local board was cured by the review procedure on appeal, and that there was basis in fact for the I–A classification by the presidential appeal board (Pet. App. 1–7).

DISCUSSION

Petitioner argues (Pet. 19) that the local board acted on the basis of a blanket characterization of Mennonites as falling in class I–A–O, and that this was error which could not be cured on appeal, no matter how extensive the investigation and hearing. The logic of this position would be to render the whole appeal procedure useless in any case where the appeal board on its own reached the same conclusion as the local board. There is no sound reason for such a result. The administrative appeal procedure was set up for the precise purpose of curing mistakes by local boards. It is therefore evident that the mere fact that a local board may have made an error is not a basis for ruling that an ultimate classification on appeal is improper.

There are, to be sure, some errors at the local board level which so taint the whole appellate process that the courts have held that the defect is not cured by appellate review. An example of such an error would be a case where the local board did not allow a registrant to make a

full record on which the appeal boards could act. See *United States* v. *Fry*, 203 F. 2d 638 (C.A. 2). So also, where the local board never passed on the claim, as required, but merely acted as a conduit in sending the file to the appeal board, it has been held that a registrant had been deprived of a substantive procedural right. *Knox* v. *United States*, 200 F. 2d 398 (C.A. 9). On the other hand, where the defect does not affect the substantial rights of the registrant and does not taint the appellate record, the courts have generally held that the error is cured by *de novo* review incident to an administrative appeal. *United States* v. *Corliss*, 280 F. 2d 808, 816–817 (C.A. 2); *Mintz* v. *Howlett*, 207 F. 2d 758 (C.A. 2). While inconsistencies do exist, there is no such basic conflict among the circuits as petitioner claims. There is, in short, no absolute doctrine of "appellate cure" or non-cure. The issue is essentially a pragmatic, factual one as to whether the error at the local board level survives sufficiently to taint the appellate process.

In this case, there is no basis for supposing that any error at the local board level infected the appellate process. In the first place, it is not at all clear that there was any error committed. Petitioner's offer of proof showed only that a I–A–O classification was given to a majority of Mennonites. This does not show lack of consideration of individual cases even if it be assumed that the board was unduly strict in this regard. In any event, it is clear that the action of the local board was not the decisive factor in the subse-

quent review of petitioner's case. The hearing officer, on the basis of the FBI investigation and his hearing, was doubtful of the sincerity of the registrant's claim to any exemption and was influenced by the local board only to the extent of recommending a I–A–O rather than a I–A classification (Pet. App. 11–12). He specifically found, on the basis of the reports and the hearing, that petitioner's "objection to noncombatant service is not sincere" (Pet. App. 12). The state appeal board and the presidential appeal board had before them the FBI résumé and the recommendation of the Department of Justice. They were unaware of the reasons for the local board action. Clearly, therefore, if the local board was in error, the error did not taint the appellate review.

On the basis of the record before it, which included the FBI résumé and the recommendation of the Department of Justice, the presidential appeal board classified petitioner I–A rather than I–A–O. This action, as the courts below held, was within the power of the board to classify *de novo*. As noted above, the letter from the Department of Justice showed that the hearing officer had doubts as to the sincerity of petitioner's C.O. claim. This stemmed not only from the fact that the reports showed that petitioner's conduct deviated from Mennonite beliefs, but because the reports and interview could be taken to indicate that petitioner did not take seriously the Mennonite objection to war. The Department of Justice hearing officer resolved these doubts in petitioner's favor largely because of his Mennonite upbringing. The fact that the presidential appeal board

resolved this borderline case the other way does not necessarily show a lack of basis in fact.

In this case, the wheels of government have ground at many levels, and have ground exceeding fine. As indicated in the discussion above, the result may be sustained by an application of the "any basis in fact" and the "*de novo* review" doctrines, as was done by the court of appeals below. Yet, this leaves a nagging doubt that the wrong result has been reached.

While not dispositive, it is relevant that this case involves a third-generation Mennonite, who was himself born in a public service camp in Virginia where his father and mother were residing because of his father's conscientious objection in World War II.

Until the last moment, no one thought that petitioner should be classified I–A. His local board classified him I–A–O—eligible for non-combatant service. He took an appeal to the state board, seeking to be classified I–O. Under the prevailing procedure, he was interviewed by a Department of Justice hearing officer. It was at this point that summaries of FBI reports got into the file, which indicated that, in his personal conduct, petitioner was not always as good as he might be, or as the tenets of his religion would require. Petitioner conceded as much, but would not yield in his objection to killing in war. The hearing officer recommended that he be classified I–A–O, and this was approved by the Department of Justice, and so reported to the state board. The state board continued the I–A–O classification.

At this point, petitioner had no further right of appeal, since the state board was unanimous. However, the Director of Selective Service took an appeal to the national board. This is sometimes called the presidential board, although it has, in fact, no contact with the President. When the Director of Selective Service takes an appeal to the national board, he simply notes that fact, without stating reasons, and the file is then transmitted, seriatim, to the three members of the national board, who reside in different cities, and ordinarily do not meet. There may be some reason for thinking that the purpose of the Director of Selective Service in taking an appeal in this case was that petitioner should be classified I–O, in view of his membership in the Mennonite Church. In accordance with practice, petitioner had no hearing before the national board, and that board stated no reasons. The board classified him as I–A. That is the only point in the whole procedure where anyone thought that a I–A classification was appropriate. From this, there is no appeal, except to the courts. Yet, the only hearing that petitioner had was before the local board, and before the hearing officer of the Department of Justice. In both of those cases, he was found to be sincere in his opposition to killing, and he was found to qualify for a I–A–O classification.

It is a difficult matter to deal with, and to classify, millions of persons, and there must obviously be considerable informality in the system. There must also be support for the persons who undertake this difficult

task. That is the appropriate foundation for the "any basis in fact" rule, established by this Court in *Estep* v. *United States,* 327 U.S. 114, and followed by the court below. In most cases, that is the appropriate rule for the review of difficult factual determinations. Yet, it is important that the courts not get themselves into the situation which tied the hands of the Massachusetts courts in the *Sacco-Vanzetti* case, where procedural rules made it impossible for the reviewing court even to consider the question whether justice was being done.

If the question here were whether petitioner should have been classified I–A–O, or, on the other hand, I–O, the problem would be a close one, and the procedural rule adopted by the court below would be hard to fault. In this case, however, petitioner has been classified I–A, after a series of procedural steps in which the issue was never whether he should be I–A until the final step, which occurred in a remote board before which he filed no papers and had no hearing. Although military service is clearly not a punishment, there is something here a little akin to the situation which this Court resolved in *Price* v. *Georgia,* No. 269, this Term, decided June 15, 1970. It is difficult to see how the national board was justified, under all the circumstances, in increasing petitioner's classification, without any additional facts being put before it, and apparently with no warning to petitioner that he might be classified I–A. The only problem he knew to be in the case was whether he should be I–A–O, or I–O.

It is the fact that petitioner was born into one of the historic peace churches, and has not left it. True, his conduct has not always been exemplary. It is likewise true that such misconduct could indicate a general lack of sincerity. But much of the evidence of misconduct here—in the vague form of summaries of FBI reports with respect to events several years earlier—does not necessarily impugn the sincerity of his views against killing in war.

If this is the proper evaluation of the situation, then procedural rules, even ordinarily salutary ones, like the "any basis in fact" and the "*de novo* review" doctrines, should not prevent the courts from reaching as accurate a result as is possible in human affairs.

Under this approach, the I–A classification was not warranted, and the order to report for induction is invalid. See Motion to Vacate the Judgment and Dismiss the Indictment in *Petite* v. *United States*, No. 45, 1959 Term, as to the Court's power to vacate a judgment of conviction on the government's motion without reaching the merits.

Accordingly, the petition for certiorari should be granted, the judgment of the court of appeals should be reversed, and the case should be remanded to the district court with instructions to dismiss the indictment.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970